



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 14, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0767

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	6.010 – Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Lawful and Proper)
# 2	5.001 – Standards and Duties 10. Employees Shall Strive to Be Professional	Sustained
# 3	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
Imposed Discipline		
Written Reprimand		

Named Employee #2

Allegation(s):		Director's Findings
# 1	6.010 – Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Lawful and Proper)
# 2	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The Complainant alleged that the Named Employees falsely arrested him and subjected him to excessive force. It was further alleged that Named Employee #1 made unprofessional statements to the Complainant.

SUMMARY OF INVESTIGATION:

This case stems from a traffic stop of the Complainant's vehicle by Named Employee #1 (NE#1). This traffic stop resulted in the Complainant's arrest and a use of force to take him into custody. The Complainant later alleged that neither NE#1 nor Named Employee #2 (NE#2), who also responded to the scene, had probable cause to arrest him and that they subjected him to excessive force. This OPA investigation ensued.

OPA reviewed NE#1's In-Car Video (ICV), which captured the traffic stop. The ICV showed the Complainant's vehicle pass NE#1 on the right. NE#1 was in the left lane at that time and the Complainant passed him in the middle lane. From OPA's review of the ICV, it appeared that the Complainant was exceeding the speed limit at the time. NE#1 moved over to the middle lane and turned on his emergency lights and siren. The Complainant continued driving for nearly 30 more seconds prior to pulling over.



After the Complainant pulled over, NE#1's Body Worn Video (BWV) showed the Complainant get out of the car and begin walking towards NE#1. NE#1 instructed the Complainant to get back in his car. The Complainant responded: "No...excuse me, my son is in the car." NE#1 gave the Complainant multiple additional orders for the Complainant to get back in his car. NE#1 stated: "I don't care what...get back in the car...before you go to jail." The BWV showed that, at this time, the Complainant had something white in his left hand (which appears to be papers) and his right hand was in the vicinity of his rear pocket/waist area. NE#1 requested a backing unit to come to his location. He again ordered the Complainant to get back in his vehicle. The Complainant replied: "Turn off your light which is in my eyes." NE#1 continued to order the Complainant to get back in his vehicle. He told the Complainant: "Get back in the vehicle now or you will go to jail, this is my last warning." The Complainant asked what he did and NE#1 replied that the Complainant was committing obstruction.

NE#1, who was out of his patrol vehicle at this time, began approaching the Complainant while telling him to "get back." NE#1 told the Complainant: "Put your hands behind your back." The Complainant turned to move back to his car and began to get inside. NE#1 tried to grab onto the Complainant's clothing. The Complainant got back into his car and sat inside. The Complainant stated: "Dude...dude...come on, come on, come on...bro." NE#1 told him: "Put your hands behind your back." NE#1 grabbed onto the Complainant's left wrist and began to pull him out of the car. The Complainant said: "Bro...bro...my kid's in the car." NE#1 repeatedly told the Complainant to get onto the ground. The Complainant stated: "Dude I just...dude...sir please...I beg of you." The Complainant was out of the car at that time and was kneeling on the ground. NE#1 pressed down on his body to get the Complainant flat on the ground. NE#1 tried to pull the Complainant's right hand to get him prone on the ground, but the Complainant braced himself with his left hand.

NE#1 told the Complainant to get flat on the ground and the Complainant said that he was already on the ground. The Complainant began to turtle up (lying on the ground with his arms underneath his body) and NE#1 continued to try to get him into a prone position. The Complainant told NE#1 that he did not want to be arrested and again asked what he had done. The Complainant's child, who was in the car at that time, could be heard in the background. At that time, NE#2 arrived on scene to assist. NE#2 unsuccessfully tried to pull the Complainant's legs out from under him. NE#2 then said that he would use a cross-face on the Complainant. This is a technique where an officer presses the arm bone against the cheek of a subject. It is purposed to cause compliance through temporal pain. NE#2 applied a cross-face and the Complainant moved onto his stomach and allowed the officers to handcuff him.

NE#1 walked the Complainant to the front of his patrol vehicle. NE#1 told the Complainant to have a seat on the front bumper. The Complainant asked: "Why are you throwing me around?" NE#1 responded: "I'm not throwing you...I ordered you to do something. You have not listened once during this traffic stop. Have a seat." The Complainant stated: "Is this enough of a seat?" NE#1 told him: "All your privilege needs to go out of the window...alright...let me tell you that now." NE#1 stepped away to call for a supervisor and NE#2 read the Complainant Miranda warnings.

NE#1 walked back over and told the Complainant that he had been stopped because he "flew past [NE#1] at a high rate of speed." The Complainant nodded and said "okay." NE#1 continued:

I was going the speed limit and you went twice as fast as I was going...alright. Then when I stopped you...you don't jump out a car during a traffic stop. I don't care what your excuse is...we work a dangerous job. I don't know if you were going to get out with a gun...a freaking baseball bat, knife or whatever and once I told you to get back in the car...you insisted otherwise and you continued to argue with me.



NE#1 asked: "Tell me why I shouldn't take you to jail for obstruction." The Complainant responded: "'I understand that you don't...you didn't know who I was and you guys do have a dangerous job.'" NE#1 stated: "You have no right...you have no right to exit your vehicle during a traffic stop, sir....no right." The Complainant replied: "Yeah...I'm sorry...if that..." NE#1 interrupted him and asked if he had ever been involved with the police before or arrested. The Complainant said yes to both. NE#1 told him: "So, you know better." The Complainant stated: "I have never...in my life...had that happen and...I understand." NE#1 explained:

But when a police officer tells you to do something, sir...for your safety and my safety...especially with everything that is going on in the world right now. If you're coming at me and you got shit in your hands...you're walking towards me...after I insist you get back in the car and if you cared anything about your child...you would have got back in the car safely.

NE#1 continued:

Because I have a family...and if you would have came out with anything in your pocket...I would have popped you...because my safety is just as important as yours. When I tell you to fucking do something...do it. There is nobody we call....we're the last line of defense. When I tell you to do something, you very well do it...because that could get very ugly. And you put your own kid in harms way. I'm not putting your kid in harms way, sir...you committed a violation...that's the law.

NE#1 further stated:

I was going to pull you over and give you a damn warning. And you're going to do all of that...after I tell you...I had to tell you five, six, seven times...over and over again. Get back in the car, sir...get back in the car...please get back in the car, sir. You would have thought I was wrong had I came and dropped your ass right here on the street and made you do it...and I still showed restraint and I still was nice to you. When I could have laid your ass out...and I should have.

In response, the Complainant said: "I see your perspective on that." NE#1 walked away and other officers interacted with the Complainant. Around this time, NE#2 determined that the Complainant might be impaired and began a DUI investigation. NE#1 returned to where they were and the Complainant said to him: "For what it's worth, I apologize...I'm sorry about that." NE#1 replied: "It's nothing personal...it becomes dangerous when people do that." The Complainant said: "I got you...the whole family thing like that...I understand."

Another officer – referred to here as Witness Officer #1 (WO#1) – also asked the Complainant why he got out of his car and did not comply with NE#1's directions. WO#1 asked: "Alright, what's your deal man? Why don't you just tell us what you were thinking, what was going through your head?" The Complainant explained:

Well, yeah I'll tell you...so I was getting out to just hurry up and gave him my papers...cause I had got out the insurance card and registration. And when he said get back in the car and I was just like...I'll just wait...you know...I'm like, I'm out here on a public street. I



wasn't...I had my hands out in front of me with the papers so I thought I was being....and he said get back in the car.

WO#1 responded: "Here's the deal man...If you're going to take anything away from this. Take it as a learning experience right. He's right...that's how stuff goes wrong...and I don't even understand, like, why wouldn't you just wanna sit in your car." The Complainant said: "I got you...I got you." WO#1 asked the Complainant: "Do people not know....do you get what I'm saying?" He continued: "There's enough awareness in the world...of traffic stops...that you sit in the car and wait for the cop to come talk to you." The Complainant replied: "Right, I get that." WO#1 again asked: ""So, what's the deal from there, why didn't you listen to him after he told you a couple of times?" The Complainant said: ""Well, what I said was...ummm...cause and I think I was a little bit just frustrated today because I had some legal discussions..."

NE#2 continued his DUI investigation, including performing field sobriety tests. NE#2 ultimately determined that the Complainant was impaired and believed that there was probable cause to arrest him for DUI. The Complainant was arrested for this offense. NE#2 ultimately drafted a warrant to take a blood sample from the Complainant. NE#2 signed the warrant in place of a judge.

The Complainant subsequently initiated this complaint with OPA. He alleged that his arrest was improper, that he was subjected to excessive force, and that NE#1 acted unprofessionally towards him. As part of its investigation, OPA reviewed the ICV and BWV recorded by both NE#1 and NE#2. OPA further reviewed the documentation generated by the officers, including the arrest report and blood draw warrant. Lastly, OPA interviewed the Complainant and both of the Named Employees.

During his OPA interview, the Complainant said that, prior to the traffic stop, he and his child had been at a PCC grocery store. They had been "unlawfully" forced out of the store by two other SPD officers. The Complainant was driving in the middle lane and he passed an SPD patrol vehicle that was in the "fast" lane. The patrol vehicle then moved behind him and turned on its emergency equipment. The Complainant said that the traffic stop was effectuated at around 125th Street and he pulled into the lot of a restaurant that he was familiar with on 128th Street. He said that he put on his turn signal to let the officer know that he was intending on pulling over. He stated that he exited the vehicle as he often did with his license and registration. He recognized problems between officers and community members that could stem from traffic stops but stated that he had never experienced an officer react to him like NE#1 did. He was offended by NE#1 screaming at him and said that he had not broken any laws. He asked NE#1 what law he had broken and told NE#1 to stop shining lights in his face.

He recalled that the officer kept yelling at him and saying that he was committing obstruction. The Complainant disagreed. NE#1 then told him to get on the ground. He said that he was concerned because it was 38 degrees out, he had work at five in the morning, and his child was in the car. He did not know whether his child's mother was available to pick the child up. He also said that not every order that comes out of an officer's mouth is a lawful one and that he had enough experience and education to know that this was not the case. He said that this was the situation here as he had not broken any laws.

When he questioned his arrest and getting on the ground, NE#1 "charged" him. He then tried to get back into his car to protect himself from NE#1. However, NE#1 pulled him out of the car and threw him to the ground. He got into a fetal position and continued to question why he was being arrested. He was ultimately handcuffed. Another officer



then came to the scene and asked him about drug use. He felt that this was ridiculous as he had not consumed any illicit substances. However, he was arrested for both obstruction and DUI.

He noted that, after the fact, NE#1 made statements that greatly concerned him. This included NE#1 saying that he could have “popped” and physically struck the Complainant. He believed that this was unprofessional.

The Complainant was later transported to the hospital and was told that he had to wear a mask. He told the officers that he had a medical and religious exemption from doing so. However, he was strapped to a gurney and a facemask was placed on him. He then had his blood drawn. He stated that this was done pursuant to a warrant that was signed by NE#2. He believed that NE#2 signing the warrant yielded it unlawful and suspect. He stated that charges were ultimately declined by the City Attorney’s Office.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

6.010 – Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer’s knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed. With regard to obstruction, which was the crime NE#1 arrested the Complainant for, the elements are as follows: “A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.”

In explaining why he arrested the Complainant, NE#1 stated that the Complainant was speeding and did so by “blowing” by his patrol vehicle. NE#1 further stated that the Complainant, unlike virtually everyone else he had ever stopped, did not immediately pull over but, instead, drove several more blocks before doing so. NE#1 explained that, thereafter, the Complainant got out of his car and stepped towards where NE#1 was situated. NE#1 said that this was extremely rare and, given the Complainant’s other actions, significantly raised the threat level perceived by NE#1. NE#1 stated that, because he felt that the Complainant’s actions placed him in danger, he ordered the Complainant to get back into the car multiple times.

NE#1 asserted that, given the above, he had the legal right to tell the Complainant to get back into his car. He stated that, when the Complainant did not do so, he had probable cause to arrest the Complainant for obstruction.

The Complainant asserted that NE#1 had no legal right to order him back into the car and that, for this reason, an arrest for obstruction was impermissible. However, based on OPA’s research, it appears that the Complainant is incorrect. As a starting point, there is clear U.S. Supreme Court precedent indicating that a motorist’s conduct during a traffic stop can be limited based on articulated officer safety concerns. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977). In *Mimms*, the U.S. Supreme Court assessed the danger that traffic stops pose to officers versus the possible intrusion to the driver and reasoned as follows: “what is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.” The Washington Supreme Court decided similarly in *State v. Mendez*, 970 P.2d 722 (Wash. 1999), holding that, where officers could articulate objective safety concerns for



ordering passengers to remain in or exit the vehicle, it was appropriate to do so. The *Mendez* court concluded that, to the extent the objective rationale exists, the intrusion is de minimis in light of officer and public safety. Lastly, in *Strange v. Spokane County*, 287 P.3d 710 (Wash. App. 2013), the Washington Court of Appeals, upheld an obstruction arrest of a driver who refused directions from an officer to get back into the car. The *Strange* court credited the safety concerns articulated by the officer.

Here, NE#1 expressed his concerns with the Complainant's conduct and the threat he perceived. When assessing the totality of the BWV, OPA deems NE#1's evaluation of the Complainant's actions and his concerns for his safety to have been legitimate. In reaching this finding and, indeed, in evaluating probable cause to arrest, OPA considers the facts from the perspective of NE#1 and a reasonable officer in his place. Moreover, and as stated above, the evidentiary burden required to prove this reasonable belief is not a high one. Given that OPA determines that NE#1 had a reasonable concern for his safety, OPA accordingly finds that, when applying U.S. Supreme Court and Washington caselaw, the Complainant's arrest for obstruction was legally justified.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #2

5.001 Standards and Duties 10. Employees Shall Strive to Be Professional

SPD Policy 5.001-POL-10 requires that SPD employees "strive to be professional at all times." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." (SPD Policy 5.001-POL-10.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person." (*Id.*) Lastly, the policy instructs Department employees to "avoid unnecessary escalation of events even if those events do not end in reportable uses of force." (*Id.*)

OPA finds that a number of NE#1's statements to the Complainant crossed the line into unprofessionalism. OPA specifically finds that the following three statements were improper: (1) "and if you would have came out with anything in your pocket...I would have popped you...because my safety is just as important as yours"; (2) "When I tell you to fucking do something...do it. There is nobody we call...we're the last line of defense. When I tell you to do something, you very well do it...because that could get very ugly"; and (3) "You would have thought I was wrong had I came and dropped your ass right here on the street and made you do it...and I still showed restraint and I still was nice to you. When I could have laid your ass out...and I should have."

OPA finds these statements to be concerning primarily based on the implicit and explicit threats of violence therein. The levels of force NE#1 suggested he could have used would have been, in OPA's opinion, impermissible in this case. Had NE#1 "popped" the Complainant, which OPA interprets as meaning shoot him, it would have been out of policy deadly force. Similarly, had NE#1 punched the Complainant and knocked him down onto the ground, that also would have almost certainly constituted excessive force. OPA finds it problematic that NE#1 asserted that he "should have" done this. OPA also finds NE#1's use of profanity to be improper, particularly since, at this time, the Complainant was in handcuffs and any exigency that existed had dissipated.



While OPA understands NE#1's concerns with the Complainant's behavior and his perceived threat to his safety, this did not justify the statements he made. Accordingly, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

8.200 - Using Force 1. Use of Force: When Authorized

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Whether force is reasonable depends "on the totality of the circumstances" known to the officers at the time of the force and must be balanced against "the rights of the subject, in light of the circumstances surrounding the event." (SPD Policy 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where "no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose." (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

The Complainant asserted that the force used to arrest him was excessive. His complaint appeared to revolve around his belief that, because his arrest was purportedly unlawful, any force used against him was impermissible. NE#1 described the force he used as de minimis. He stated that he pulled the Complainant from the car and towards the ground. NE#1 disputed the Complainant's description that he was thrown to the ground or slammed down. NE#1 said that he then used his body weight to hold the Complainant down until another officer arrived to assist. NE#1 noted that he did not strike the Complainant and used nothing but low-level force to effectuate the arrest. Notably, NE#1's description of the force is consistent with OPA's interpretation of the BWV. Ultimately, NE#1 denied that the force was excessive and noted that the Complainant had no injuries.

As discussed above, OPA finds that there was probable cause supporting the Complainant's arrest. Given that NE#1 had probable cause, he was allowed to take the Complainant into custody, including handcuffing the Complainant and transporting him from the scene. At the time NE#1 told the Complainant that he was under arrest, the complainant did not comply and put his hands behind his back to allow this to occur. Instead, he turned and got back into his car. During his OPA interview and in his report generated after the incident, NE#1 explained that this raised the threat level in his mind as it demonstrated the Complainant's active decision not to comply and created the possibility that the Complainant could try to flee the scene. Doing so in his car would have posed a significant danger to both NE#1 and others. In assessing NE#1's belief, it is not necessary to conclusively establish the Complainant's state of mind. Indeed, it is possible that, as the Complainant asserted, he did not intend to do so. The relevant consideration is whether NE#1's belief that this was what the Complainant was planning was reasonable based on the facts and circumstances facing him at that time. OPA finds that it was.

NE#1 further explained that the Complainant's conduct even before this was abnormal and seemed dangerous to him. Both NE#1 and NE#2 stated that it was extremely rare for people to get out of their cars after being pulled over and even more rare for those individuals to not return to their cars when told to do so multiple times by an officer. NE#1 said that this, coupled with the Complainant's driving, his failure to immediately pull over, and his demeanor during this the stop, increased the need to take the Complainant into custody quickly and safely. NE#1 denied that he "charged" the Complainant and said that, while it was possible that the Complainant's clothes were ripped, this was a result of the Complainant actively pulling away. Both of these assertions were consistent with the video. Lastly,



under these circumstances, holding the Complainant to the ground pending his handcuffing was consistent with policy and not was excessive.

For the above reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #2 - Allegation #1

6.010 – Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

The Complainant alleged that NE#2 also contributed to his unlawful arrest.

NE#2 was not involved in the decision to arrest the Complainant for obstruction. When he arrived, NE#1 was already attempting to take the Complainant into custody and NE#2 assisted him in doing so.

After this took place, NE#2 assessed the Complainant to determine whether he was DUI. Ultimately, NE#2, who is a Drug Recognition Expert, concluded that the Complainant was, in fact, impaired. In reaching this determination, NE#2 pointed to the fact that the Complainant had been speeding, that his pupils were constricted, and that his speech was rapid. All of these factors suggested to NE#2 that the Complainant was DUI.

NE#2 later sought a warrant to take a sample of the Complainant's blood. NE#2 signed the warrant in place of a judge. The Complainant asserted that this was improper and was further evidence of his improper arrest.

As discussed above, OPA notes that probable cause is not a high legal standard. In the absence of compelling evidence indicating that an arrest was unlawful, OPA gives deference to the factual determinations made in real time by officers. This is particularly the case with regard to DUI arrests, which are extremely fact specific and which rely on sensory observations made by the officer that cannot be recreated by OPA and may not be captured on BWV.

Here, OPA cannot say that NE#2's determinations concerning the Complainant being DUI were unreasonable or unsupported by the evidence. Stated differently, OPA believes that there was a sufficient basis, again when applying the reasonable officer standard required, for NE#2 to conclude that the Complainant was DUI. To the extent the Complainant's blood draw comes back negative for illicit substances, he will have the right to pursue legal remedies against NE#2 and the Department at that time. However, neither that evidence nor any other facts undermining NE#2's determination are present in this case.

Lastly, contrary to the Complainant's belief to the contrary, NE#2 was permitted to sign the warrant in lieu of a judge pursuant to RCW 10.79.035, CrR 2.3, and CrRLJ 2.3. As such, this was not improper.

For the above reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #2 - Allegation #2

8.200 - Using Force 1. Use of Force: When Authorized



When NE#2 arrived on scene, he observed NE#1 trying to take the Complainant into custody. NE#2's BWV reflected that the Complainant was not permitting himself to be handcuffed and had functionally turtled up. Given this, NE#2 was entitled to use force to assist NE#1 in effectuating the Complainant's arrest. In doing so, NE#2 was permitted to assume that NE#1 had a lawful basis make the arrest in the first place.

The force used by NE#2 was entirely consistent with his training. Officers are taught to use the cross-face for exactly this type of scenario. Indeed, virtually immediately after employing this tactic, the Complainant stopped turtling and allowed himself to be handcuffed. NE#2 used no other force.

As the force used was consistent with NE#2's training and was no more than was necessary to get the Complainant into handcuffs, OPA finds that it was within policy. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**